Ng Yok Gee & Anor v CTI Leather Sdn Bhd (Metro Brilliant Sdn Bhd & Ors, intervener)

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO D5–28–57 OF 2000
RAMLY ALI J
26 AUGUST 2006

Companies and Corporations — Liquidators — Removal of — Grounds for — Whether any cause for removal shown

Companies and Corporations — Liquidators — Removal of — Application for — Earlier application filed by interveners dismissed — Earlier application supported by applicant in the instant application — Whether instant application barred by res judicata — Res judicata, application of in wider sense

The applicant a contributory and creditor of the respondent company ('the respondent') applied to remove the liquidator of the respondent pursuant to s 232 of the Companies Act 1965 ('the Act'). The interveners to the instant application (encl 117) had previously filed an application (encl 95) for the same liquidator's removal. The applicant had then appeared by counsel and had supported the interveners' application in encl 95. Enclosure 95 was however dismissed and was under appeal. The instant application, encl 117, was based on the following grounds: (i) the liquidator had failed to prepare accounts as required; (ii) the liquidator had selectively made a payment to a creditor of the respondent; (iii) the liquidator was biased against the applicant; (iv) the liquidator did not have the confidence of the majority of the respondent's contributories and creditors; and (v) there was an appeal lodged by the interveners with regard to the dismissal of encl 95. The High Court had to decide: (a) whether the applicant was barred from raising any of the grounds on the basis of issue estoppel and/or res judicata; and (b) whether the applicant had shown cause for the removal of the liquidator.

Held, dismissing the application with costs:

(1) The interveners who had filed the earlier application (encl 95) and who were supporting the instant application (encl 117) were bound by the decision of the court in encl 95 and were thus prevented based on the principle of res judicata from filing and/or supporting a similar application (encl 117) (see paras 7–8).

(2) The fact that the applicant had actively supported the application in encl 95 made him equally bound by the decision in encl 95 (see para 10); *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] AC and *Tradium Sdn Bhd v Zain Azahari Zainal Abidin & Anor* [1995] 1 MLJ 668 followed.

(3) Whereas issue estoppel refers to issues actually decided, res judicata in its wider sense applies to issues/matters which could have been raised in earlier proceedings but which were not, and which properly belonged to the subject matter of the earlier proceedings(see para 12); *Henderson v Henderson* (1843) 3 Hare 100 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed. The principle of res judicata also applies as between two stages in the same litigation such that a decision by the court at one stage on a particular matter is binding on it at a later stage (see para 15); *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 referred.

(4) In considering the grounds submitted by the applicant, the High Court had to ask the following questions: (i) whether the issue had been raised and actively decided upon in the earlier proceedings thus giving rise to an issue estoppel; and (ii) if not, whether it could have been raised in the earlier proceedings (res judicata in the wider sense) (see para 16). On the facts, all the issues raised in the instant application (encl 117) could have been brought before the court during the hearing of the earlier application vide encl 95. It was an abuse of process for the applicant to seek to re-litigate these matters (see para 47).

(5) A liquidator may be removed if it is in the interest of all those who are interested in the company being liquidated. However, in the instant application, the applicant had not shown that all the contributories and creditors supported his application (see paras 48–49).

(6) In the instant case, it was clear that there was no cause shown by the applicant warranting the removal of the liquidator. The liquidator was in fact in his final stages of liquidation with the real property recently sold. There was thus no merits in the instant application and it ought to be dismissed with costs (see paras 51–53).

[Bahasa Malaysia summary

Pemohon adalah penyumbang dan juga pemiutang kepada syarikat responden ('responden') memohon untuk menyingkirkan penyelesai responden berdasarkan kepada s232 Akta Syarikat 1965 ('akta'). Pencelah melalui permohonan ini (lampiran 117) telah sebelum itu menfailkan permohonan (lampiran 95) untuk perkara yang sama untuk penyingkiran penyelesai. Pemohon telah hadir melalui peguamcaranya dan menyokong permohonan pencelah di dalam lampiran 95. Walau bagaimanapun, lampiran 95 telah ditolak dan masih dalam rayuan. Permohonan ini, lampiran 117, adalah berdasarkan sebab-sebab berikut: (i) penyelesai telah gagal untuk menyediakan akaun seperti yang diminta; (ii) penyelesai telah membuat pemilihan dalam pembayaran kepada pemiutang responden; (iii) penyelesai adalah berat sebelah terhadap pemohon; (iv) penyelesai tidak mempunyai keyakinan terhadap penyumbang dan pemiutang majoriti responden; dan (v) terdapatnya rayuan oleh pencelah berkenaan dengan penyingkiran iaitu lampiran 95. Mahkamah tinggi perlu membuat keputusan (a) sama ada pemohon telah dihalang daripada menimbulkan sebarang sebab atas dasar isu estopel dan/atau res judicata dan (b) sama ada pemohon dapat menunjukkan sebab penyingkiran penyelesai.

Diputuskan, permohonan ditolak dengan kos: A

(1) Pencelah yang telah memfailkan permohonan sebelum ini (lampiran 95) dan yang juga menyokong permohonan ini (lampiran 117) adalah terikat dengan keputusan mahkamah di lampiran 95 dan adalah terhalang berdasarkan kepada prinsip res judicata daripada memfailkan dan/atau menyokong permohonan yang sama (lampiran 117) (lihat perenggan 7–8). B

(2) Fakta yang menunjukkan pemohon secara aktif menyokong permohonan di dalam lampiran 95 membuatkan beliau bersamaan terikat dengan keputusan di lampiran 95 (lihat perenggan 10); *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] AC dan *Tradium Sdn Bhd v Zain Azahari Zainal Abidin & Anor* [1995] 1 MLJ 668 diikut. C

(3) Manakala isu estopel merujuk kepada isu yang telah diputuskan, res judicata dalam kesan yang lebih meluas diguna pakai dalam isu/perkara yang sepatutnya dibangkitkan di dalam prosiding terdahulu tetapi tidak dan sebaik-baiknya merujuk semula kepada kandungan prosiding terdahulu (lihat perenggan 12); *Henderson v Henderson* (1843) 3 Hare 100 dan *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut. Prinsip res judicata juga diguna pakai di antara dua peringkat di dalam litigasi yang sama di mana keputusan mahkamah di satu peringkat ke atas satu perkara tertentu adalah mengikat ke atasnya pada peringkat seterusnya (lihat perenggan 15); *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 dirujuk. D E

(4) Dalam mempertimbangkan sebab-sebab yang dihujahkan oleh pemohon, mahkamah tinggi perlu bertanyakan soalan-soalan berikut: (i) sama ada isu yang dibangkitkan dan secara aktifnya diputuskan ke atas prosiding terdahulu akan membangkitkan isu estopel, dan (ii) jika tidak, sama ada ia seharusnya dibangkitkan di dalam prosiding terdahulu (res judicata dalam kesan yang meluas) (lihat perenggan 16). Berdasarkan kepada kesemua isu yang dibangkitkan di dalam permohonan ini (lampiran 117) sepatutnya dibangkitkan di mahkamah semasa pendengaran permohonan terdahulu iaitu lampiran 95. Ini adalah satu penyalahgunaan proses untuk pemohon meminta untuk melakukan litigasi semula ke atas perkara ini (lihat perenggan 47). F G

(5) Penyelesai boleh disingkirkan jika ini demi kepentingan semua yang mengingini syarikat tersebut dibubarkan. Tetapi dalam permohonan ini, pemohon tidak menunjukkan yang kesemua penyumbang dan pemiutang menyokong permohonannya (lihat perenggan 48–49). H

(6) Di dalam permohonan ini, adalah jelas tiada sebab ditunjukkan oleh pemohon yang mewajarkan penyingkiran penyelesai. Penyelesai sesungguhnya berada di peringkat akhir pembubaran dengan penjualan hartanah baru-baru ini. Oleh yang demikian, tiada merit di dalam permohonan ini dan seharusnya ditolak dengan kos (lihat perenggan 51–53).] I

Notes

For cases on removal of liquidators, see 3(1)*Mallal's Digest*(4th Ed, 2003 Reissue) paras 377–378.

Cases referred to

Adam Eyton Limited; Ex parte Charlesworth (1887) 36 Ch Div 299 (refd)
Advance Housing v Newcastle Classic Developments [1994] 12 ACLC 701 (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)
Chi Liung Holdings Sdn Bhd v Soon Seng Kok [1996] 3 CLJ 86 (refd)
Chua Boon Chin v JM McCormack & Ors [1979] 2 MLJ 156 (refd)
Commonwealth of Australia v O'Reilly [1984] 52 ALR 31 (refd)
George Bond & Co Ltd, In re (1932) SR NSW 301 (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
Henderson v Henderson (1843) 3 Hare 100 (folld)
Hoystead v Commissioner of Taxation [1925] AC 155 (refd)
Lockyer v Ferryman (1877) AC 519 (refd)
Nana Ofori Atta II v Nana Abu Bonsra II [1957] AC (folld)
Procam (Pte) Ltd v Nangle [1990] 3 MLJ 269 (refd)
Sir John Moore Gold Mining, In re (1879) 12 Ch Div 325 (refd)
Tradium Sdn Bhd v Zain Azahari Zainal Abidin & Anor [1995] 1 MLJ 668 (folld)
White Cliffs Dredging Co, In re (1893) 11 NZLR 711 (refd)

Legislation referred to

Companies Act 1965 ss 232, 281

Francis Goh (Francis Goh & Co) for the applicant.
Shireen Selvaratnam (Azman Davidson & Co) for the liquidator.

Ramly Ali J:

[1] Enclosure 117 is an application by contributory of the respondent company, ie Mr Chin Cheen Foh ('the applicant') to remove the liquidator of the respondent ('Mr Ong Tee Chow') pursuant to s 232 of the Companies Act 1965.

[2] In addition to being a contributory, the applicant is also interested in the affairs of the respondent as a creditor vis a vis Messrs TH Jaya Marketing, a business wholly owned by Mr Chin Cheen Foh

[3] The applicant has raised five grounds in his application, ie:

(a) failure to prepare accounts as required;
(b) selected payment to one of the creditors namely the second intervener;
(c) bias by the liquidator against the applicant in rejecting a proof of debt filed by Messrs TH Jaya Marketing (which is wholly owned by the applicant);
(d) the liquidator does not have the confidence of the majority of the creditors and contributories;

(e) there is an appeal by the interveners against the refusal of their application to remove the liquidator.

RES JUDICATA/ISSUE ESTOPPEL

[4] The interveners had previously filed an application to remove the same liquidator (encl 95).

[5] During the hearing of encl 95, the applicant appeared by counsel and supported the application for the liquidator's removal.

[6] This court on 11 September 2002 dismissed encl 95. This is the decision that is now under appeal referred to in ground para 3(e) above.

[7] Two of the three interveners who filed encl 95, are now supporting the present application. They have even filed affidavits.

[8] These intervenes are bound by the decision of the court in encl 95 and are now prevented based on the principle of res judicata from filing/supporting a similar application and hence re-litigating the same issues.

[9] The object of the rules of res judicata as set out in the case of *Lockyer v Ferryman* (1877) AC 519 at p 530 is put upon two grounds:

(a) public policy, that it is the interest of the State that there should be an end to litigation, and

(b) the hardship on the individual, that he should be vexed twice for the same cause.

[10] The fact that the applicant actively supported encl 95, makes him equally bound by the earlier decision in encl 95. This principle as stated in the case of *Nana Ofori Atta II v Nana Abu Bonsra II* [1957] AC 101 where the Privy Council stated:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits two exceptions: one is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct... This conduct sometimes consists of active participation in the previous proceedings...

[11] This decision of *Nana Ofori* was followed by the Malaysia Court of Appeal in the case of *Tradium Sdn Bhd v Zain Azahari Zainal Abidin & Anor* [1995] 1 MLJ 668.

[12] Whilst issue estoppel refers to issues which were actually decided, res judicata in its wider sense applies to issues/matters which could have been raised in the earlier

A proceedings but which were not, and which properly belong to the subject matter of that earlier litigation. This principle was first enunciated in the very old case of *Henderson v Henderson* (1843) 3 Hare 100 where it was stated that:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies... to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time.

[13] This principle also applies to new views of the law which parties or their solicitors might form. (*Hoystead v Commissioner of Taxation* [1925] AC 155 at p 165).

[14] All the above cases on res judicata in the wider sense were accepted and followed by the Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189.

[15] The principle of res judicata also applies as between two stages in the same litigation such that a decision by the court at one state on a particular matter is binding on it at a later stage (see *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57).

[16] Based on the principles set out above, the court is of the view that in considering the five grounds raised by the applicant in this application, two questions must preliminary be answered, ie:

(a) Was the issue raised and actively decided on the earlier proceedings thus giving rise to an issue estoppel?

(b) If not, as the cause of complaint already in existence, and could it has been raised in the earlier proceedings (res judicata in the wider sense)?

[17] The court shall now proceed to consider the grounds separately.

FAILURE TO PREPARE ACCOUNTS AS REQUIRED

[18] It is not disputed that the liquidator has filed his accounts with the Registrar of Companies and with the official receiver.

[19] The accounts were submitted with the Registrar of Companies periodically as required. The fact that the accounts may have been lodged a few days late does not in any way prejudice the liquidation. At most, it is a technical breach of s 281 of the Companies Act 1965 which is then a matter for the Registrar of Companies to pursue, if they so wish.

[20] The fact that the accounts were not submitted to the official receiver until very recently was an oversight on the part of the liquidator and clearly an honest mistake. If the liquidator had intended to hold back the financial information, then he would not have filed it with the Registrar of Companies.

[21] The honest mistake of a liquidator is not a ground for his removal if the mistake has not seriously prejudiced the liquidation (see *Procam (Pte) Ltd v Nangle* [1990] 3 MLJ 269.

[22] In any event, in the earlier proceedings under encl 95, the liquidator had previously stated in his affidavit at para 33 of encl 109 that his accounts had been filed with the Registrar of Companies.

[23] It was therefore open to the applicant at that time to check with the Registrar of Companies the dates of the various lodgings of the accounts and/ or whether the accounts were ever filed with the official receiver. This could have been done but was not done.

[24] This issue is therefore caught by the principle of res judicata in the wider sense and cannot be canvassed as a ground in the present application.

SELECTED PAYMENT TO ONE OF THE CREDITORS NAMELY THE SECOND INTERVENER

[25] This payment was made to the second intervener during the hearing of encl 95 and evidence of this payment was before the court in the liquidator's previous affidavit at para 17 and exh OTC-11 of encl 113.

[26] This issue is therefore also clearly caught by the principle of res judicata and therefore must be ignored.

[27] In any event, the liquidator at para 16 of encl 121 explains the reason why the second intervener was paid in full. It is not a selective payment as alleged.

[28] The liquidator has previously explained that the assets of the respondent which is stated to be RM7,116,506.17 at the commencement of the winding up was a figure obtained from the statement of affairs of the company prepared by their directors. However, this figure of RM7,116,506.17 is comprised largely of a contingent asset of RM6m being the sum claimed for a defamation action filed by the respondent company against the petitioners in the year 2000 but since struck off by the court on 27 September 2001, ie Civil Suit No 22–198 of 2000.

[29] This would mean that the only substantial asset of the respondent is the real property which has not been realised yet. Contrary to the allegation of the applicant, the respondent company does not have sufficient funds to pay all their creditors until after the sale of the real property.

[30] The applicant, who is a director of the company and the initiator of the defamation action is well aware that the RM6m is an illusory asset.

[31] The liquidator has to date not paid even the creditors who appointed the liquidator, eg Mr Fong Seong Thye, one of the petitioners who appointed the liquidator.

BIAS BY THE LIQUIDATOR AGAINST THE APPLICANT IN REJECTING A PROOF OF DEBT FILED BY MESSRS TH JAYA MARKETING (WHICH IS WHOLLY OWNED BY THE APPLICANT)

[32] The allegation by the applicant is that the liquidator is biased against him because he filed a defamation suit against the liquidator in his personal capacity ie, Civil Suit No 23–7 of 2002.

[33] The liquidator has denied any bias against the applicant or any other person interested in the liquidation.

[34] In any event, the court dismissed the defamation suit and the applicant's appeal to the learned judge was also dismissed. Therefore, if there is any hostility it is clearly on the part of the applicant because he lost the defamation case.

[35] The applicant claims that evidence of the liquidator's bias can be seen by the fact that the proof of debt filed by his company Messrs TH Jaya Marketing was rejected

[36] Firstly, the liquidator is not bound to accept all proofs. He is entitled to reject a proof if he doubts the claim. The mere rejection of a proof therefore is not a ground for removal of the liquidator.

[37] Secondly, the applicant has filed an appeal against the rejection of the proof and the liquidator will justify his rejection of the proof during the hearing of the appeal.

[38] This court should not at this stage pre-judge this issue now.

[39] The liquidator took time to consider the proof filed by Messrs TH Jaya Marketing because he had to ask for further information and documents and investigate the claim. The liquidator also had to verify the information with limited accounting records of the respondent company as they were not fully made available to him.

[40] The liquidator not only may but is obligated to scrutinize and if not satisfied reject a proof of debt in the interest of the other creditors and the contributories. **A**

THE LIQUIDATOR DOES NOT HAVE THE CONFIDENCE OF THE MAJORITY OF THE CREDITORS AND CONTRIBUTORIES **B**

[41] As a matter of law, it is not a sufficient ground for removal of a liquidator that a substantial minority or even the majority of shareholders wants the liquidators to be removed. It is not a popularity contest.

[42] The court must be satisfied that it is against the interest of all those who are interested in the company being liquidated that the liquidator should remain/be removed (see *Adam Eyton Limited; Ex parte Charlesworth* (1887) 36 Ch Div 299 and *George Bond & Co Ltd, In re* (1932) SR NSW 301). **C**

[43] This point emerges in the passages quoted from *Chi Liung Holdings Sdn Bhd v Soon Seng Kok* [1996] 3 CLJ 86 as follows: **D**

> That the court may remove a liquidator appointed by a company even without there being any misconduct alleged against him, if it appeared on the whole that it was for the benefit of the company in liquidation that he should be removed.

It was further held: **E**

> If the Court in satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated; that a particular mean should be made a liquidator, then the Court has the power to remove the present liquidator and of course then to appoint some other person in his place.

F

> ... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation.

> ... that in order to effect the removal of the liquidator the Court needs only to be satisfied that it is for the general advantage of those interested in the assets of the company that the liquidator be removed... **G**

[44] In the present case, the applicant has not shown that all the contributories and creditors support his application.

H

[45] In any event, this issue is clearly res judicata as it was adjudicated upon in the previous application as clearly be seen at p. 8 of the grounds of judgment of the learned judge.

THERE IS AN APPEAL BY THE INTERVENERS AGAINST THE REFUSAL OF THEIR APPLICATION TO REMOVE THE LIQUIDATOR **I**

[46] This ground is self defeating. In any event, it is not a ground for removal of the liquidator. The very fact that the earlier application to remove the liquidator is

pending appeal to the Court of Appeal means that the applicant's remedy is to ventilate his grouse in the Court of Appeal and not before this court again.

[47] All the issues raised in the present application could have been brought before the court during the hearing of the earlier application vide encl 95. It is an abuse of process for the applicant to seek to re-litigate these matters at the High Court level.

PRINCIPLES OF LAW

[48] The principles of law is that a liquidator may be removed if it is in the interest of all those who are interested in the company being liquidated.

[49] However, in the present case, the applicant has not shown that all the contributories and creditors support his application.

[50] For convenience, the court, set out below the relevant legal principles applicable to an application to remove a liquidator:

(a) A liquidator appointed by the court can only be removed by the court 'on cause shown' — s 232 of Companies Act 1965.

(b) The court does not have an unfettered discretion as 'cause must be shown'. The position is not the same as it is when a liquidator is first appointed and the court may choose between two or more competing candidates.

(c) The normal ground for removal is that the liquidator has a personal unfitness, has failed to act impartially or is in a position where his duty and interest are in conflict. See:

(i) *In re Sir John Moore Gold Mining* (1879) 12 Ch Div 325, p 331;

(ii) *Advance Housing v Newcastle Classic Developments* (1994) 12 ACLC 701; and

(iii) *Commonwealth of Australia v O'Reilly* (1984) 52 ALR 031.

(d) As to what constitutes a conflict of interest, there has to be a real and not merely theoretical possibility of conflict before a liquidator can be removed (*Advanced Housing*).

(e) A liquidator may act even though there has been a prior involvement with the company, provided that the involvement is unlikely to impede the liquidator from acting impartially (*Advanced Housing*).

(f) In *Advanced Housing* there was an actual conflict because the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

(g) It is an integral part of a liquidator's duty to investigate the affairs of the company from its foundation onwards (*Commonwealth of Australia v O'Reilley*).

(h) A liquidator who fails to investigate the affairs of the company to the prejudice of an applicant is in neglect of his duty and can be removed (see *In re Sir John Moore Gold Mining Company*).

(i) It cannot be a ground for removal that a liquidator is carrying out his duty to investigate the affairs of the company, even though some interested parties may object.

(j) In a case where the application for removal is by a creditor, all the creditors must be given notice of the application or it must be shown conclusively that the removal is for the benefit of all creditors (see *In re White Cliffs Dredging Co* (1893) 11 NZLR 711).

(k) A liquidator is not bound to pursue a claim on behalf of the company, unless he believes that it has a reasonable prospect of success (see *In re George A Bond and Company Ltd* (1932) SR (NSW) 301).

(l) Where there are no assets which can be imperiled by the continuance in office, fair play to the liquidator may be the decisive factor (see *In re George Bond*).

(m) Fair play to the liquidator is not to be left out of sight. (*Chua Boon Chin v JM McCormack & Ors* [1979] 2 MLJ 156 at p 158).

(n) In *Adam Eyton Limited; Ex parte Charlesworth* (1887) 36 Ch Div 299, the applicant for removal of liquidator was required to give an undertaking to pay all costs and expenses of the liquidator on solicitor and client basis.

[51] Based on the principles above, it is clear that in the present case there is no cause shown by the applicant warranting the removal of the liquidator.

[52] What this court must also take into account is the fact that the liquidator is in his final stages of his liquidation with the real property recently sold. This is a relevant factor to be considered (see *Chua Boon Chin v JM McCormack & Ors*).

CONCLUSION

[53] In the premises, the court is satisfied that there is no merit in the present application (encl 117) and therefore the application is dismissed with cost.

Application dismissed with costs.

Reported by John Paul Simon